

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 22, 2022

CLAIM NO. 201367013

KY FUEL CORPORATION

PETITIONER

VS. APPEAL FROM HON. JONATHAN WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RICHARD COLE and
HON. JONATHAN WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
VACATING & REMANDING

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and MILLER, Members.

MILLER, Member. This claim has taken a long and winding road through the workers' compensation system. It has now been appealed to the Board three times and has reached the Court of Appeals and the Supreme Court of Kentucky. This appeal stems from reopening due to worsening impairment which led to a finding by

the Hon. Jonathan Weatherby, Administrative Law Judge (“ALJ”), of permanent total disability (“PTD”) benefits. In the Supreme Court Opinion, rendered September 30, 2021, affirming the Court of Appeals, the Court remanded this claim for explicit findings regarding the cause of the worsening impairment, functional limitations, and the restrictions. Because there was both a work injury and pre-existing nonwork-related conditions, the ALJ needed to cite evidence of medical causation supporting the worsening impairment and the award of PTD benefits.

BACKGROUND

Richard Cole (“Cole”) initially filed a claim asserting he suffered injuries to his back and neck on September 15, 2013 while driving a vehicle in the course and scope of his employment with KY Fuel Corporation (“KY Fuel”). Cole was hauling rock when the air bag burst at a dip in the road, causing the seat to bottom out against the frame. Cole alleged injuries to his back, hip, and neck. In an Opinion and Award dated February 15, 2016, Hon. Thomas G. Polites, Administrative Law Judge (“ALJ Polites”) awarded Cole, temporary total disability (“TTD”) benefits and permanent partial disability (“PPD”) benefits based on a 10% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”) for the back injury, enhanced by the three-multiplier per KRS 342.730(1)(c). ALJ Polites also found a safety violation was committed by KY Fuel per KRS 342.165(1) and awarded medical benefits for the low back injury. Although there was significant evidence that Cole had a pre-existing active back condition, ALJ Polites believed it was dormant and aroused into disabling reality by the work event. Though Cole also

alleged injuries to his hip and neck, ALJ Polites limited his award to the lumbar injury.

KY Fuel filed a Petition for Reconsideration. ALJ Polites overruled the petition, finding “the Defendant failed in its burden of demonstrating a pre-existing active condition, and that Plaintiff’s pre-existing condition was dormant and aggravated or aroused into a disabling state by the work injury and therefore compensable.” There was no further appeal.

KY Fuel filed a Motion to Reopen and medical dispute in 2016 regarding treatment by Dr. Mansoor Mahmood. In an Opinion dated December 23, 2016, ALJ Jonathan Weatherby ruled in favor of KY Fuel in its challenge of certain medications prescribed by Dr. Mahmood.

Cole filed a Motion to Reopen based on a Change of Disability on November 8, 2017. He alleged an increase of the impairment rating from 10% to 13% and a worsening of his functional abilities. Cole supported his motion with a report from Dr. Anbu Nadar. In a September 21, 2017 report, Dr. Nadar assessed a 13% impairment rating, stating that Cole’s condition had worsened since his prior evaluation. Cole also filed a 2018 addendum from Dr. Nadar, stating a 2018 MRI showed progression of Cole’s disc osteophyte complex at the L3-4 and L4-5 level. Dr. Nadar opined Cole’s condition had progressed since his previous MRI.

KY Fuel offered evidence from Dr. Thomas Loeb, who also assessed a 13% impairment rating, which he opined resulted from nonwork-related conditions. Dr. Loeb also found Cole’s functional limitations to be caused by the nonwork-related conditions.

The ALJ awarded PTD benefits in an Opinion rendered on August 27, 2018. KY Fuel filed a Petition for Reconsideration, which was denied by the ALJ. KY Fuel appealed to the Board.

The Board issued an Opinion on January 25, 2019, affirming in part and vacating in part, and remanded the claim to the ALJ for further evidentiary support for the PTD benefits. The Board stated the ALJ did not address specific factors including work history, education, and ability to perform sedentary work. The Board noted the significant reliance by the ALJ on the functional limitation of ambulation. The Board ruled there was a lack of evidentiary proof of medical causation regarding the ambulation difficulties.

In terms of whether there had been a worsening of the work-related back injury, the Board found substantial evidence supported the ALJ's determination based on Dr. Nadar's report and the Form 107 that the underlying dormant degenerative conditions were aroused and exacerbated by the work injury. Dr. Nadar stated that Cole's condition and symptoms had worsened since 2013. Dr. Nadar assessed a 13% impairment rating, an increase from the 10% rating found by ALJ Polites. There was no appeal.

On remand, the ALJ issued an Opinion on May 29, 2019. Again, he found Cole permanently totally disabled. He discussed Cole's testimony regarding his functional limitations of ambulating and the restrictions assessed by Dr. Nadar. He subsequently overruled the Petition for Reconsideration filed by KY Fuel.

Upon a second appeal to the Board, in an Opinion dated September 13, 2019, the Board affirmed the ALJ. The Board ruled the ALJ had conducted the

analysis mandated by Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000) in finding Cole permanently totally disabled. The Board stated the ALJ had provided, “a minimally sufficient analysis to support the findings of PTD.” See City of Ashland v. Stumbo, 461 S.W. 3d 392 (Ky. 2015).

It should be noted there has been much discussion of *res judicata* concerning the Board’s January 25, 2019 Opinion, not appealed, that Cole’s work-related low back condition had worsened since the rendition of the original 2015 Opinion of ALJ Polites. However, there was no finding by the Board that Cole’s PTD was attributable solely to his worsening back condition caused by the work injury.

The issue remains whether medical evidence attributes Cole’s current functional limitations to the worsening work-related back condition independent of any non-work conditions. Cole has an underlying pre-existing back condition of congenital spinal stenosis. He also has a bilateral arthritic hip condition, more significant to the right hip, and a left tibia injury, which required surgery in 2006, and he was diagnosed as a non-union left tibia with drainage in 2018.

The Court of Appeals’ October 12, 2020 Opinion reversed the Board, vacated the award of PTD benefits, and remanded the claim to the ALJ. The Court of Appeals agreed with the Board that the medical evidence and testimony of Cole was sufficient to support the ALJ’s conclusion that he was incapable of working. However, the Court of Appeals directed the ALJ to provide explicit findings determining whether Cole’s work-related condition caused his total disability based upon expert medical evidence. On remand, it stated the ALJ must address whether

Cole's difficulty ambulating and the medical restrictions stem solely from his work-related low back injury.

Cole appealed to the Kentucky Supreme Court. Cole argued that principles of "*res judicata*" foreclose further litigation over whether substantial evidence supports a finding that Cole's current low back condition, and its worsening render him totally disabled.

In the Opinion affirming the Court of Appeals, the Supreme Court acknowledged the Board's finding that Cole's work-related low back condition had worsened; however, it held the ALJ failed to make sufficient findings regarding medical causation. Further, the Court stated there was no medical evidence that established that the functional impairments which led to the finding of PTD solely resulted from the work-related injury. The Court also found that the ALJ failed to distinguish the nonwork-related conditions and their effects. In fact, the Court opined the medical evidence was uncontroverted that the nonwork-related conditions were responsible for the limitations, hence the ALJ could not rely on Cole's testimony and the ALJ's own assessment of Cole's impairment to support the PTD award.

Typically, the claimant's testimony can be probative of the extent of his disability once work-related impairment is established. Hush v. Adams, 584 S.W.2d 48, 51 (Ky. 1979). However, such is not the case when the ALJ's findings conflict with the medical evidence. Kingery v. Sumitomo, 481 S.W.3d 492, 496 (Ky. 2015). The Supreme Court found Dr. Loeb's opinion uncontroverted because the opinion of Dr. Nadar, which established a worsening low back condition, did not

specifically address causation and failed to address whether nonwork-related conditions contributed to Cole's worsened condition.

Dr. Loeb believed the functional limitations were caused by osteoarthritis of the hips and osteomyelitis of the left leg in addition to congenital spinal stenosis. Since Cole's difficulty with ambulation is at the heart of this matter, the Supreme Court specifically remanded the claim for specific findings of the medical causation of the functional limitations excluding nonwork-related conditions. The Court wrote, "So, to award Cole PTD benefits, the ALJ must cite evidence that the work-related injury has caused Cole's total disability. KRS 342.730 (1)(A)."

On remand, the ALJ issued his Amended Opinion and Award, dated January 11, 2022. He again found Cole permanently totally disabled. The ALJ discussed the March 23, 2018 MRI in comparison to the June 25, 2014 MRI, citing that Dr. Nadar noted progression of the disc osteophyte complex at L3-4 and L4-5 and that Cole's condition had worsened since the previous MRI. The ALJ referred to Dr. Nadar's 2017 report showing a worsening of condition, a 13% impairment rating, and continued residuals from the neck and back secondary to the work injury.

KY Fuel filed a Petition for Reconsideration, which was overruled on January 25, 2022.

KY Fuel appealed to this Board. The sole issue is whether the ALJ has complied with the dictates of the Supreme Court in awarding PTD benefits.

ANALYSIS

ALJ Polites originally determined that a work injury to the back aroused a pre-existing dormant condition into disabling reality. Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007). ALJ Polites found the lumbar condition was not symptomatic before the work injury. It was undisputed Cole suffered from a significant pre-existing condition of spinal stenosis. Cole also suffered from neck and hip pain, the hip being arthritic, as well as osteomyelitis in the left tibia, which was not work-related. The low back injury was the only injury found to be compensable.

Cole has argued that, since the initial Opinion found the arousal of a pre-existing condition was compensable, that finding is *res judicata* as to all increases in disability being compensable. Notwithstanding whether the correct legal doctrine is the “law of the case,” or *res judicata* as referred throughout this litigation, the earlier finding does not preclude contesting causation of the increase in impairment and functional limitations. Because the work injury aroused a pre-existing condition that became disabling in 2013, it does not automatically follow that all increased impairment and functional limitations are attributable to the work injury alone.

It is undisputed that Cole has not only a significant pre-existing lumbar condition and congenital stenosis, but he also had bilateral hip osteoarthritis, particularly on the right side, and a left leg disorder, osteomyelitis, causing drainage that presumably needed to be addressed. These are nonwork-related conditions. Cole testified regarding his difficulty ambulating and at times even dressing himself. Since the difficulty of ambulation as testified by Cole and the ALJ’s observations were

critical pieces of evidence relied on by the ALJ in awarding PTD benefits, this claim requires medical opinions as to causation. While Cole can testify to his abilities, that testimony cannot be used to determine medical causation of the difficulties.

Per KRS 342.730(1)(a), nonwork-related impairments shall not be considered in determining whether the employee is totally disabled. An exclusion from a total disability award must be based upon pre-existing disability, while an exclusion from a partial disability award must be based upon pre-existing impairment. Roberts Bros. Coal Co. v. Robinson, 113 S.W.3d 181, 183 (Ky. 2003).

The Supreme Court explicitly found that the cause of Cole's worsening condition and its relationship to the disability had not been proven. The Supreme Court addressed the medical testimony of Dr. Nadar and Dr. Loeb. Of importance is Dr. Nadar's report focusing on how Cole's condition has worsened but failing to adequately address the cause. In contrast, Dr. Loeb specifically stated Cole's impairment and limitations resulted from nonwork-related conditions of osteoarthritis and osteomyelitis. The Court found KY Fuel's evidence, Dr. Loeb's report, uncontroverted.

In his Amended Opinion and Award on remand, the ALJ found that *res judicata* applied as to the prior finding by ALJ Polites that Cole's condition constitutes a work-related arousal of a dormant condition. The ALJ cited to the MRI findings of Dr. Nadar, who noted the progression of his disc osteophyte complex at L3-4 and L-5, and also noted the restrictions imposed by Dr. Nadar, including no lifting of more than 30 pounds on an occasional basis and 10 to 15 pounds frequently. The ALJ found the progression of these symptoms as identified by Dr.

Nadar and the description offered by Cole regarding how his symptoms affected his ambulation was credible and convincing. The ALJ further found, based upon the medical evidence, as well as Cole's explanation of his symptoms, the ambulation difficulties were due to his work-related back injury and his resulting inability to walk and perform the activities of daily living that he described was also causally work-related.

While the ALJ is usually given latitude in relying on lay testimony, personal experience, and inference, this is not the case when these conflict with the uncontroverted medical evidence regarding medical causation. Kingery v. Sumitomo, *supra*.

There is no mention in the ALJ's Findings of Fact and Conclusions of Law of Cole's nonwork-related conditions, specifically the hips or leg, and particularly the right hip and the left tibia. The ALJ did not fully discuss Dr. Loeb's findings regarding Cole's hip disorder and left tibial non-union's effects on his ambulation. The ALJ accepted the overall 13% impairment rating assigned by Dr. Loeb, the same rating as assessed by Dr. Nadar.

Significantly, there is no specific statement by Dr. Nadar that the low back condition solely caused the need for increased physical restrictions. If anything, the statement by Dr. Nadar that Cole suffers from continual "residuals to his neck and back secondary to work injury" is not particularly helpful as the neck claim was dismissed. More problematic is the lack of any differentiation between the back and the other nonwork-related conditions in relation to functional restrictions. Since the left leg, right hip, and back conditions are all intertwined when discussing

ambulation, a medical opinion is necessary. Only Dr. Loeb fully addressed the issue and he believes the main functional problems are caused by the right hip and leg conditions. The Opinion on remand does not cure this defect and, therefore, the award of PTD benefits is vacated.

The Board does agree with the ALJ there was a worsening of the back condition, as previously affirmed by the Board, to increase the impairment from 10 to 13% per the AMA Guides. In the Boards' Opinion from January 25, 2019, it stated Dr. Nadar's opinion constituted the requisite substantial evidence supporting the determination Cole's condition had worsened. Dr. Nadar had compared the 2014 MRI to the 2018 MRI and noted a "progression of Cole's disc osteophyte complex at L3-4 and L-4-5 levels." Dr. Nadar, in the Form 107 and narrative report, expressed his belief Cole's underlying dormant degenerative conditions were aroused and exacerbated by the work injury. Further, the Board affirmed the ALJ that the worsening was due to the work injury. Therefore, the ALJ had substantial evidence of record to support this portion of the ALJ's decision. Special Fund v. Francis, 708 S.W. 2d 641, 643 (1986). Since no appeal was filed, this finding is conclusive. Hysteam Coal Corporation v. Ingram, 141 S.W.2d 570 (Ky. App. 1940).

Accordingly, the January 11, 2022 Amended Opinion and Award on Remand and the January 25, 2022 Order on Petition for Reconsideration awarding PTD benefits are **VACATED**. This claim is **REMANDED** to the ALJ to make findings and an award based on the 13% impairment rating and the increase in permanent partial disability benefits.

ALL CONCUR.

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